ORIGINAL

RECEIVED
DEC 23 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 85-5454

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

DAVID RANDOLPH GRAY
Petitioner

VERSUS

STATE OF MISSISSIPPI
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE
SPECIAL ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

DONALD G. BARLOW
SPECIAL ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

Attorneys for Respondents

TABLE OF CONTENTS

	PAGE NUMBER
Table of Contents	i
Table of Authorities	ii
I. Introduction	1
II. Opinions Below	1
III. Jurisdiction	1
IV. Constitutional Provisions and Statutes Involved	1
V. Statement of the Case	1
VI. Reasons for Denying the Writ	2
A. Certiorari Should be Denied Since the Opinion of the Mississippi Supreme Court Merely Corrected an Error of the Trial Judge	2
Conclusion	6

TABLE OF AUTHORITIES

PAGE

Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980).....2

Gray v. State, 472 So. 2d 409 (1985).....1

Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288 (1967).....3

Swain v. Alabama, 380 U.S. 202, 219, 13 L. Ed. 2d 759, 772, 85 S. Ct. 824 (1965).....5

Wainwright v. Witt, ___U.S.___, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).....2, 4

Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).....2

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES

Sixth Amendment to the Constitution of the United States.....1

Fourteenth Amendment to the Constitution of the United States.....1

28 U.S.C. § 1257(3).....1

Miss. Code Ann. (1972, as amended):

§ 97-3-19.....1

§ 99-19-101.....1

I. INTRODUCTION

This matter is before the Court on petition for writ of certiorari to the Mississippi Supreme Court seeking review of that Court's affirmance of the Petitioner's conviction and sentence of death. The Petitioner is proceeding in forma pauperis with the aid and assistance of counsel.

II. OPINIONS BELOW

The opinion of the Mississippi Supreme Court affirming the conviction and death sentence is reported as Gray v. State, 472 So. 2d 409 (1985).

III. JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3), asserting denial of rights secured by the United States Constitution.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner relies on the provisions of the Sixth Amendment and the Fourteenth Amendment to the United States Constitution. Petitioner was indicted and found guilty of capital murder pursuant to Miss. Code Ann. § 97-3-19 (1972, as amended) and sentenced to death by the jury after a separate hearing on the punishment pursuant to Miss. Code Ann. § 99-19-101 (1972, as amended).

V. STATEMENT OF THE CASE

Respondents accept the statement of the case set forth by the petitioner herein with the exception that the complete voir dire of juror Bounds is attached hereto as a portion of the appendix. The voir dire of juror Bounds is found at pages 529-555 of the record filed in the Mississippi Supreme Court.

VI. REASONS FOR DENYI'G THE WRIT

A. CERTIORARI SHOULD BE DENIED SINCE THE OPINION OF THE MISSISSIPPI SUPREME COURT MERELY CORRECTED AN ERROR OF THE TRIAL JUDGE

The situation which leads to the filing of this petition for certiorari was brought about by the failure of the trial judge to properly exclude jurors for cause at the request of the prosecution when such jurors clearly failed to meet the standards set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980); and Wainwright v. Witt, ___U.S.___, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

It is rather obvious from the record that the trial judge was attempting to preclude any problems arising from challenges of jurors for cause by requiring the state to use peremptory challenges to remove jurors who were clearly not qualified to serve on the petit jury. While it is admirable for the trial judge to attempt to avoid reversible error, his efforts here led to the present confused state of affairs.

By the time juror Bounds was voir dired the State had been forced to use all of its peremptory challenges and, therefore, had none left with which to remove juror Bounds. This situation arose from the failure of the trial court to excuse jurors, Mr. Ruiz, Mrs. Coker, Mrs. Bush, Mrs. Price, and Mrs. Walker.[1] Of course, had the trial court properly excused these five jurors the state would have had a peremptory challenge with which to remove Mrs. Bounds and

---

[1] The voir dire of these individuals is attached hereto as part of the appendix. The voir dire is set forth as follows: Mr. Ruiz (Record 367-378); Mrs. Coker (Record 381-383); Mrs. Bush (Record 385-393); Mrs. Price (Record 394-400); Mrs. Walker (Record 401-403).

this petition would not be necessary. Unfortunately, the trial court did not follow this path, and even when the judge attempted to correct his error, he created more confusion. Instead of simply reversing his ruling as to one of the five jurors previously excused by the state on their peremptory challenges, he excused juror Bounds for cause.

Respondents respectfully suggest that there is no doubt that the five jurors which the state was required to exercise peremptory challenges to remove should have been removed for cause. This was recognized by the Mississippi Supreme Court in its opinion wherein the Court stated:

> Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed, and most highly disfavored, it should be obvious to all that no prejudice occurred to the defendant Gray. The force and effect of the trial court's ruling was to correct an error he had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance. Certainly the state is entitled to a jury that can follow the instructions and jurors oath. Adams, supra; Witt, supra. That being the case the trial court was correct when it recognized the error in its prior rulings and took affirmative action to correct that error. [472 So. 2d at 422-423, emphasis added]

Of course, errors of a trial judge may be corrected on appeal. Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed. 2d 288 (1967). The ruling by the Mississippi Supreme Court simply recognized that the trial court should properly have reversed itself on its earlier rulings as to the five jurors and excused them for cause which would then have allowed the state to reclaim its previously expired peremptory challenges. Thus, the ruling of the Mississippi Supreme Court simply corrected error of

the trial judge. As the Mississippi Supreme Court went on to state:

> There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling prior to the empanelling of the jury in termination of trial. Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings, especially where as here, there could have been no possible prejudice to the defendant. [472 So. 2d at 423].

Respondents would respectfully suggest that the words of the trial judge in rectifying the problem which had occurred are not some "magical incantation" which cannot be cured. What should be examined is the effect of the ruling, and not simply the words which led to it. The defendant is merely entitled to an impartial jury, and it is doubtful whether this issue would have been raised at all had this not been a capital case. Respondents would respectfully suggest that the ruling in this case should not be different simply because it is a capital case than it would be in any other case. As stated by this Court in Wainwright v. Witt, supra:

> . . .there is nothing talismanic about juror exclusion under Witherspoon merely because it involves capital sentencing juries. Witherspoon is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who will quite likely be biased in his favor. [83 L. Ed. 2d at 851].

The State is put in a somewhat unique position in this case as it is the one claiming foul for being forced to exhaust its peremptory challenges on persons who should have been excused for cause. It is beyond peradventure that had the roles been reversed, that the defendant would have had reversible error. The State, however, does not wish to "win the battle and lose the war". If the State simply says that it was required to exhaust its peremptory challenges on persons who should have been excused for cause and the Court then determines that that was, in fact, reversible error, it is placed in the position of asking the Court to order a retrial, which it does not want, after obtaining a conviction and death sentence. Whereas this would be the proper route for the defendant, it would be ludicrous for the State. Therefore, the State's position is simply that by correcting the lower court's error, the Mississippi Supreme Court has "set the record straight" without prejudice to the State or defendant. Respondents would respectfully suggest that this as at least part of the role which it is expected that appellate courts will play.

The exercise of peremptory challenges is clearly a matter of state law. "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges" Swain v. Alabama, 380 U.S. 202, 219, 13 L. Ed. 2d 759, 772, 85 S. Ct. 824 (1965) quoting Stilson v. United States, 250 U.S. 583, 586, 63 L. Ed. 1154, 1156, 40 S. Ct. 28. It is, of course, a very important part of our jurisprudence and "The denial or impairment of the right is reversible error without a showing of prejudice", Swain, supra, 380 U.S. at 219. Here the State is the one impaired, and the defendant cannot complain since his rights were not denied or impaired. The State is simply asking this Court to

recognize its rights in peremptory challenges as well as those of the defendant. The defendant received a fair trial by an impartial jury, and that is all the Constitution requires.

Since the defendant was not prejudiced, and since the Mississippi Supreme Court has corrected the error of the trial judge, certiorari is simply not warranted in this case. The State as well as the defendant is entitled to a fair and impartial jury, which is what was empanelled for the trial of the defendant. In fact, even here, the Petitioner does not contend that the jury which actually tried, convicted, and sentenced him to death was not fair and impartial. Instead, he relied solely on an error of the trial judge which was corrected by the Mississippi Supreme Court.

CONCLUSION

For the above and foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE
SPECIAL ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

DONALD G. BARLOW
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: Donald G. Barlow
DONALD G. BARLOW

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

APPENDIX

BY MR.
NECAISE: Then, I take it, Mr. Ladner, that if you feel that this is a case, after you have heard all of the evidence in this case, Mr. Ladner, if you feel that, based on the evidence that you heard and the law that His Honor gives you, if you feel that this is a case, if you feel that the evidence warrants the imposition of the Death Penalty, and the Court tells you that the Death Penalty is allowed in this type of case, are you telling me that you could vote for the Death Penalty?

BY MR.
LADNER: Yes, sir.

BY MR.
NECAISE: You're telling me that you could do that?

BY MR.
LADNER: Yes, sir.

BY MR.
NECAISE: Mr. Ruiz, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR.
RUIZ: Yes, I do.

BY MR.
NECAISE: You do. Now, is that in this particular type case, Mr. Ruiz, or in any case?

BY MR.
RUIZ: In any case.

BY MR.
NECAISE: Are you telling me, Mr. Ruiz, that no matter what law, what instruction His Honor would give you all on that, if he told you that this is a case that, uh, where you could bring in the Death Penalty, are you telling me thatpu could not, that you could, nonetheless, not under any circumstances bring in a penalty and impose the Death Penalty, regardless of what the law is?

BY MR.
RUIZ: No, I couldn't.

BY MR.
NECAISE: You could not.

Is that in this case or in any type case?

BY MR. RUIZ: Any type case.

BY MR. NECAISE: Did the Court hear those questions?

BY THE COURT: Yes, sir.

BY MR. NECAISE: All right, sir. Now, if Your Honor please, we move to strike Mr. Ruiz for cause.

BY THE COURT: I'll overrule it, at this point.

BY MR. NECAISE: All right, sir. We intend to, uh, this is the time, if Your Honor please, that we would like to use one of our challenges at this time, uh, to replace him so that we can move on.

BY THE COURT: All right. You can step down, Mr. Ruiz.

BY MR. NECAISE: And let the record show that the State takes exception to the Court's ruling on that because we think.....

BY THE COURT: (Interposing) All right.

BY MR. NECAISE: .....it's a classic case of one for cause.

BY THE COURT: All right. Uh, Mrs. Berthelot. Right up there, Mrs. Berthelot. You take his place.

And Mr. Ruiz may go and call back tomorrow afternoon, after five.

Go ahead, Mr. Necaise.

BY MR. NECAISE: Mrs. Berthelot, I'll just go on and ask you, while you're here, so I can move right on down.

Mrs. Berthelot, you heard the questions as to what type of case this was and so forth and what your

ing to ask it. But, I feel that this is the type of case that warrants my knowing, without any doubt in my mind as to what your feelings about it are. And I make that explanation to you about it.

Mrs. Coker. Mrs. Coker, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS.
COKER: I do not believe in it.

BY MR.
NECAISE: You do not believe in Capital Punishment.

Now, Mrs. Coker, do you tell me you don't believe in Capital Punishment in this type of case or in any type of case?

BY MRS.
COKER: In any type of case.

BY MR.
NECAISE: You mean to tell me that if the Court instructed you that this is a case, gave you the law and told

you that this is a case whereby you could impose the Death Penalty, that you would not follow the law, if it meant imposing the Death Penalty?

BY MRS.
COKER: (Inaudible.)

BY MR.
NECAISE: Ma'am?

BY MRS.
COKER: I would not.

BY MR.
NECAISE: You would not do it?

BY MRS.
COKER: I would not do it.

BY MR.
NECAISE: You just don't believe in Capital Punishment.

BY MRS.
COKER: That's right.

BY MR.
NECAISE: And you would never vote for Capital Punishment, are you telling

me, in any case or just this type case?

BY MRS. COKER: In any case. I would never vote for it in any case.

BY MR. NECAISE: You would never vote for the Death Penalty.

Now, if Your Honor please, we would move at this time for the Court to excuse Mrs. Coker for the same reason.

BY THE COURT: I'll require you to use one of your challenges.

BY MR. NECAISE: All right, sir.

BY THE COURT: You call back tomorrow afternoon, after five o'clock.

Mrs. Bush, you take her place. Annie Mae Bush. You take her place, the one that just left.

BY MR. NECAISE: You want to question her, first?

BY THE COURT: You can ask her the questions.

BY MR. NECAISE: Sir?

BY THE COURT: You can just ask her the questions.

BY MR. NECAISE: Which ones did you want me to ask her?

BY THE COURT: Well, let's see, there's two ladies up there, too, Mrs. Berthelot and Mrs. Ware.

BY MR. NECAISE: Mrs. Berthelot and Mrs. Ware. Any of the three of you, Mrs. Berthelot, Mrs. Ware and Mrs. Bush, any of you know any of the parties that the Court inquired about?

Any of the lawyers ever represented you or any member of your family?

Any of your husbands, uncles, brothers, cousins or anybody members of any law enforcement agencies?

Anybody know any of the witnesses that the Court called?

Any of you three know anything about the case, read anything in the newspapers about the case, when it happened?

BY MRS.
WARE: I've heard about it.

BY MR.
NECAISE: Whatever you've heard about it, Mrs. Ware, could you put that out of your mind and try this case on the law and the evidence and nothing else?

BY MRS.
WARE: Yes, sir.

BY MR.
NECAISE: Now, Mrs. Bush, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS.
BUSH: I don't know, I don't know if I do or not.

BY MR.
NECAISE: Now, if the Court, you're going to first be called upon to decide the guilt or innocence.

BY MRS.
BUSH: Yes, sir.

BY MR.
NECAISE: And after that, if you find him guilty, then the Court is, you are going to hear some additional evidence. And then you are going to go back and decide whether he suffers the Death Penalty or whether he gets a life sentence.

Now, are you telling me that you have any conscientious scruples, do you believe in Capital Punishment?

BY MRS.
BUSH: (Inaudible.)

BY MR.
NECAISE: Ma'am?

BY MRS.
BUSH: Yes, if he's guilty.....(inaudible.)

BY MR.
NECAISE: Ma'am?

BY MRS.
BUSH: Yes, if he's guilty.

BY MR.
NECAISE: But, you, are you saying that you don't know?

BY MRS.
BUSH: No, I don't.

BY MR.
NECAISE: You don't know whether one deserves it or not. Well, of course, you wouldn't know that until you heard the evidence.

BY MRS.
BUSH: I mean, you know, I would, I would vote not guilty.

BY MR.
NECAISE: You would vote not guilty, if you was on the Jury?

BY MRS.
BUSH: That's right.

BY MR.
NECAISE: You mean you would vote not guilty as to what one of them, uh, about whether he committed the crime or not guilty as to whether he ought to get the Death Penalty?

BY MRS.
BUSH: Not guilty as to whether he should get the Death Penalty. I don't think anybody should get the Death Penalty.

BY MR.
NECAISE: You don't think anybody, ma'am?

BY MRS.
BUSH: (Inaudible.)

BY MR.
NECAISE: You don't think anybody ought to ever get the Death Penalty?

BY MRS.
BUSH: I mean, the way the Jury is going now, what I'm saying is, I would, I would vote not guilty.

BY MR.
NECAISE: Right now, the way this Jury's going, you would put not guilty?

BY MRS.
BUSH: Yes, sir.

BY MR.
NECAISE: Is that not guilty, you would.....

BY MRS.
BUSH: (Interposing) I would, you know, I would vote not guilty on the Death Penalty.

BY MR.
NECAISE: You would, in other words, you don't believe in the Death Penalty?

BY MRS.
BUSH: No, sir, I don't.

BY MR.
NECAISE: Is that in just this kind of case or any kind of case?

BY MRS.
BUSH: Any kind of case.

BY MR.
NECAISE: You just don't believe anybody ought to get the Death Penalty?

BY MRS.
BUSH: Yes, sir.

BY MR.
NECAISE: You just don't believe that anybody ought to get the Death Penalty. Regardless of what the evidence is?

BY MRS.
BUSH: I'm saying that I don't think anybody should get the Death Penalty.

BY MR.
NECAISE: Regardless of what the evidence are, you don't believe anybody ought to be put to death for any type of crime that they've committed?

BY MRS.
BUSH: Well, look here, I mean, I don't know whether he's guilty or not guilty. I can't say whether he's guilty or not guilty.

BY MR.
NECAISE: I understand that. And we going to have to prove.....

BY MRS.
BUSH: (Interposing) That's why, that's why I say I can't say that he should have the Death Penalty. I can't say that.

BY MR.
NEOCAISE: Let me ask you this, you are first going to be called upon to decide his guilt or innocence.

BY MRS.
BUSH: (Inaudible.)

BY MR.
NEOCAISE: And let's say that all twelve of you agree that he did it. Okay.

Now, he's been convicted. All twelve of you have agreed that he's the one what killed him, killed Ronald Wojcik.

And then you'll come out here and you'll hear some more evidence and you'll go back to that same room a second time and you'll decide whether he ought to get life or death.

Now, at that time, could you vote for the Death Penalty?

BY MRS.
BUSH: (Inaudible.)

BY MR.
NEOCAISE: Ma'am?

BY MRS.
BUSH: I don't think so.

BY MR.
NEOCAISE: Well, is it, is it just this type of case, Mrs. Bush, or is it any case?

BY MRS.
BUSH: It would be in any case.

BY MR.
NEOCAISE: Well, are you telling me that no matter what type of crime occurred, no matter what type of crime occurred out here in the streets in the City of Gulfport, that if Mrs. Bush was brought up here to decide, along with eleven other folks, that that individual that committed that crime ought to get the Death Penalty, could you vote for the Death Penalty?

BY MRS.
BUSH: No, sir.

BY MR.
NEOCAISE: You could not, are you telling me now that you never would vote for the Death Penalty?

BY MR.
BUSH: Yes, sir.

BY MR.
NECAISE: Now, with her answer being in the negative, if the Court please, we call upon the Court again and ask the Court to excuse her because of her conscientious scruples against Capital Punishment.....

BY THE
COURT: (Interposing) I'll overrule you on that. Let her step down.

BY MR.
STEGALL: Judge, are you going to excuse her for cause on that?

BY THE
COURT: No. You step down.

And, Mrs. Price, you take her place.

(Off-the-record discussion between Mr. Necaise and Mr. Stegall.)

BY THE
COURT: He used his challenge on her, peremptorily.

BY MR.
NECAISE: Do you want to question her first, Judge?

BY THE
COURT: No, you can go ahead with Mrs. Price now.

BY MR.
NECAISE: Mrs. Price, Mary Price, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS.
PRICE: I don't believe in Capital Punishment.

BY MR.
NECAISE: Are you telling us that where the evidence, where the law allows and the evidence warrants, that you could not, in fact, vote for the Death Penalty?

BY MRS.
PRICE: I just don't think that the Death Penalty should be imposed.

BY MR.
NECAISE: Are you telling me, Mrs. Price,

that you couldn't vote for the Death Penalty in this type of case or any type of case?

BY MRS. PRICE: In any type of case.

BY MR. NEGAIS: Okay. Now, let me say this to you. I don't, uh, don't be embarrassed. You are perfectly entitled to that feeling, uh, and if that's your view, you are certainly entitled to it. I am certainly not trying to embarrass you.

But, what I am looking for is twelve people who come into the Jury Box who say that if the evidence warrants and the law allows, that they could, in fact, impose the Death Penalty if they find those two, if the law allows and the evidence warrants.

And, uh, but, you are, are you telling me that you couldn't, you could not, in this, not in any type, not in any type of case, regardless of what type of crime happened in the streets of the City of Gulfport,

that you could not, you could never vote, when they brought the individual in, who had been adjudged guilty, you could never vote to give he or she the extreme penalty of death, regardless of what the evidence showed?

BY MRS. PRICE: Well, it would depend upon the type of case and depending upon the facts.

BY MR. NEGAIS: What type of case would it take? Give me a set of facts where you would vote to impose the Death Penalty.

BY MR. STEGALL: If it please the Court, I object to that.

BY THE COURT: Overruled.

BY MR. NEGAIS: Give me a set of facts, Mrs. Price, where, if you were seated on the Jury, and the person had been adjudged guilty, and you had heard

all the evidence and he had been adjudged guilty. And now it becomes time for you to decide the penalty phase. What type of evidence, what type of case would it have to be for you to vote for the Death Penalty?

BY MRS. PRICE: (No response.)

BY MR. NEGAIRE: Ma'am?

BY MRS. PRICE: You've confused me.

BY MR. NEGAIRE: Well, I don't, I'm sorry, I don't mean to confuse you and I apologize. I hope I'm not doing it. Am I?

BY MRS. PRICE: No. I'm just nervous.

BY MR. NEGAIRE: I know your nervous. Okay. Just settle down and just be calm. Did you understand my question?

BY MRS. PRICE: You wanted to know what type of case, what facts it would take for me to be able to vote for the Death Penalty.

BY MR. NEGAIRE: Right. And that is a case where the law warrants it and the evidence allows it. You see, the law, it's not my law and it's not the Judge's law, we have to follow the law that the Legislature passes up there in Jackson and that the United States Supreme Court says is the law, we have to take those laws and work with them. And, as you heard the Judge explain, not every person who kills someone can get the Death Penalty.

But, if you kill someone while doing certain things, then you are subject to the Death Penalty, if the Jury so desires to impose the Death Penalty.

And, what I'm trying to find out is that if this is a case that you find that the evidence allows and the law warrants, in this case,

the imposition of the Death Penalty, could you vote to give this Defendant, right here, the Death Penalty?

BY MRS. PRICE: I don't think I could.

BY MR. NEGAISE: You don't think you could. Is that on this case or on any case?

BY MRS. PRICE: I don't think I could take it upon myself to vote for the Death Penalty for anybody.

BY MR. NEGAISE: On any case?

BY MRS. PRICE: Yes, sir.

BY MR. NEGAISE: Ma'am?

BY MRS. PRICE: Yes, sir, on any case.

BY MR. NEGAISE: You could never vote for it.

Now, if Your Honor please, we would

excuse, ask that the Court, ask the Court to excuse her for the same cause, we call upon the Court to excuse her.

BY THE COURT: I'll overrule you.

BY MR. NEGAISE: Judge, how many has the State used?

BY THE COURT: Five.

You can step down. Call back tomorrow afternoon, after five.

Mr. Herring, take her place.

BY MR. NEGAISE: Mr. Herring, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR. HERRING: No, sir.

BY MR. NEGAISE: Then, I take it that if you found that this was a case where the law allows and the evidence warrants

the imposition of the Death Penalty, you could, in fact, vote for the Death Penalty?

BY MR. HERRING: Yes, sir.

BY MR. NECAISE: Now, let's see, you're going to have to help me. This is Mrs. Walker. Mrs. Walker, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. WALKER: (Inaudible.)

BY MR. NECAISE: Ma'am?

BY MRS. WALKER: I don't have any objection to it. But, I couldn't vote for it.

BY MR. NECAISE: You don't have any objections to it, but you just couldn't vote for it.?

BY MRS. WALKER: No.

BY MR. NECAISE: It would be all right for somebody else to vote for it. But, you couldn't vote for it. Is that what you're telling me, Mrs. Walker?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: You believe in it, but you couldn't vote for it?

BY MRS. WALKER: Yes, sir.

BY MR. NECAISE: Is that in this type, in this particular type case, Mrs. Walker, or in any type case?

BY MRS. WALKER: In any type case.

BY MR. NECAISE: Are you telling me that no matter what the evidence in this case would show, you could never vote

for the Death Penalty in any kind of case?

BY MRS. WALKER: No, I couldn't.

BY MR. NECAISE: If the Court please, we call upon the Court again.

BY THE COURT: I'll overrule you again and let you use your peremptory.

BY MR. NECAISE: Judge, let me ask that the record state that in all of these I am taking exception to the Court's ruling.

BY THE COURT: All right.

You may step down, Mrs. Walker.

And Mrs., uh, Saucier, is it Mr. or Mrs. Saucier?

BY MRS. SAUCIER: Mrs.

excuse Mrs. Clemons.

BY THE COURT: All right, Mrs. Clemons. You call back tomorrow, after five.

Mrs. Bounds, you take her place. Mrs. H. C. Bounds.

Mrs. Bounds, do you know anyone involved in this lawsuit?

BY MRS. BOUNDS: No, sir.

BY THE COURT: Know of no reason why you couldn't be a fair and impartial Juror?

BY MRS. BOUNDS: No, sir.

BY THE COURT: You think you meet all the tests to be a fair and impartial Juror?

BY MRS. BOUNDS: I'll try.

BY THE COURT: I am sure you will.

What do you say as to Mrs. Bounds, Mr. Necaise?

BY MR. NECAISE: Mrs. Bounds, have you read anything in the newspaper or saw anything on the television about this case?

BY MRS. BOUNDS: Yes, sir.

BY MR. NECAISE: Whatever that was, could you put that out of your mind and try this case strictly on the law and the evidence that comes from this w.t-ness stand?

BY MRS. BOUNDS: Yes, sir.

BY MR. NECAISE: All right. And do you have any con-scientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: I don't know.

BY MR. NECAISE: Well, I don't know either.

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Well, I mean, I don't know how you feel about it. I know how I feel about it. I believe in it. You know, if you asked me, I could vote to impose the Death Penalty. But, I'm not going to be allowed to vote on it.

And, what I am trying to do is to find twelve people who tells me that they have no conscientious scruples against Capital Punishment when imposed by the law.

Do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Are you telling me, Mrs. Bounds, that you could, if the evidence allows, if the evidence warrants and the law allows the imposition of the Death Penalty, that you

could, in fact, vote for the Death Penalty?

BY MRS. BOUNDS: Would you ask me that again?

BY MR. NECAISE: All right. If the evidence warrants it and the law allows it, I can tell you at the front end that the law, in this type of case, allows the imposition of the Death Penalty.

The evidence will be a decision for you to make as to whether this type of evidence warrants the imposition of the Death Penalty.

BY MRS. BOUNDS: (Inaudible.)

BY MR. NECAISE: Could I ask the Court to question Mrs. Bounds further?

BY THE COURT: Well, Mrs., uh, Bounds, the question is this, uh, I'll read it to you.

"Would you automatically vote

against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: I would try to listen to the case.

BY THE COURT: That's not answering my question. Uh, the question. The question will be, should be answered yes or no. Now, I'll read it again.

"Would you automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: Read it again.

BY THE COURT: Huh?

BY MRS. BOUNDS: Would you read that over again?

BY THE COURT: All right, I'll read it again.

Uh, now listen carefully to what I'm asking you.

"Would you automatically vote against the imposition of the Death Penalty regardless of the evidence that might be developed in the trial of this case?"

BY MRS. BOUNDS: No, sir.

BY THE COURT: You would not?

BY MRS. BOUNDS: No, sir.

BY THE COURT: All right. I take it then that you have no conscientious scruples against the imposition of it, when it's authorized by law, if you would not automatically vote against it?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Nobody goes around.....

BY MR. NECAISE: (Interposing) Judge, she was about to answer the Court on something. I don't know what it was.

BY THE COURT: What is it, Mrs. Bounds?

BY MRS. BOUNDS: I would do my best.

BY THE COURT: Well, that's not the question.....

BY MRS. BOUNDS: (Interposing, but inaudible as the Court continued talking, as Mrs. Bounds was talking.)

BY THE COURT: .....as to whether you would do your best or not. Nobody's doubting your sincerity, Mrs. Bounds. And, uh, the law does not allow the Courts to go around, just willy-nilly, killing people because of crimes. Do you understand?

BY MRS. BOUNDS: (Inaudible.)

BY THE
COURT: It's certain types of crimes where it may be imposed and the question is simply this:

"Would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the trial of this case?"

BY MRS.
BOUNDS: No, sir, I don't think I would.

BY THE
COURT: She said she wouldn't.

BY MR.
NECAISE: No, sir. She said I don't think I would.

BY THE
COURT: Answer me yes or no, Mrs. Bounds. If you're against it, say so. And if you're not, say you're not. You can say one or the other.

BY MRS.
BOUNDS: No, sir.

BY THE
COURT: No?

BY MRS.
BOUNDS: No, sir.

BY THE
COURT: In other words, you do not have any conscientious scruples against the imposition of the Death Penalty, if it's authorized by law. Is that right?

BY MRS.
BOUNDS: No.

BY THE
COURT: No. Okay.

BY MR.
NECAISE: Mrs. Bounds, if this is a case where you find, from the evidence that it warrants the imposition of the Death Penalty, could you go back there and vote for the Death Penalty in this case?

BY MR.
STEGALL: Judge, I'm going to object to him continuing, she, the Court has explained to her fully.....

BY THE
COURT: (Interposing) Overruled, one time.

I'm not going to let him go much further though.

BY MR.
STEGALL: Excuse me, Mr. Necaise.

BY MR.
NECAISE: In this case, if the evidence warrants and the law allows, and you get back there.....(inaudible).. and you all are back there, trying to decide whether this Defendant should suffer the penalty of death, and you find from the evidence that you've got laid there before you that, in your opinion, from what you've heard and what you've seen from the evidence, that this is a case that warrants this man dying in the gas chamber, could you vote that he should suffer the penalty of death?

BY MRS.
BOUNDS: I have to say yes or no?

BY MR.
NECAISE: Yes, ma'am.

BY MRS.
BOUNDS: How can I say that when I've never

experienced it?

BY MR.
NECAISE: Well, what I am saying is could you listen to the evidence and if you find that this is a case, if the case warrants it - that's a decision you're going to have to make. If this is a case that you find, in your mind, okay, if this is a case, this is in your mind, if you think, if you come up with this conclusion, okay, this is a case that this person should suffer the Death Penalty, such horrible, atrocious, heinous crime, in my opinion, in Mrs. H. C. Bounds' opinion, this man should suffer the penalty of death, could you write down "Death Penalty"?

BY MRS.
BOUNDS: I don't think I could.

BY MR.
NECAISE: You don't think you could?

BY MRS.
BOUNDS: I don't think I could.

BY MR.
NECAISE: You could not!

Now, if Your Honor please, we.....

BY THE
COURT: (Interposing) Well, I don't know whether she could or couldn't. She told me she could, a while ago.

BY MR.
NECAISE: Well, all I can do, Judge, is go by what, by what the lady says.

The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use.....

BY THE
COURT: (Interposing) Well, I think I had one or two that.....

BY MR.
NECAISE: (Interposing) I agree with you, Judge. There's two of them.....

BY THE
COURT: .....just used that to get off of the Jury. At least one person that I'm positive of.

BY MR.
NECAISE: Well, I'm sorry that they did that, Judge.

BY THE
COURT: All right. All right.

Let me ask you the question again. Now, answer me yes or no and search your conscience on it because you, you, I know you're an honest and sincere person.

BY MRS.
BOUNDS: I think I am.

BY THE
COURT: And anybody that,uh, born and raised up in Scott County and goes to the Presbyterian Church is, uh, has got to be a good clean individual.

All I want you to do is just search your own conscience and tell me, positively, give me a yes or no, to this and don't equivocate. The question, once again, is:

"Would you automatically vote against the imposition of the Death

Penalty regardless of any evidence that might be developed in the trial of this case?"

Now, take your time and think about it and answer it yes or no, Mrs. Bounds.

BY MRS. BOUNDS: No, sir.

BY THE COURT: You are positive it's no?

BY MRS. BOUNDS: Yes.

BY THE COURT: Well, do you understand that, uh, you're telling me now that you can impose the Death Penalty?

BY MRS. BOUNDS: (No audible response.)

BY THE COURT: Do you understand that's what you are telling me?

BY MR. NECAISE: Judge, the lady does not understand

your question.

BY THE COURT: Wait a minute, Mr. Necaise.

BY MR. STEGALL: Judge, I'm going to object to the District Attorney.....

BY THE COURT: (Interposing) I've already, I've already set him down. I don't need any help from either one of you. All right.

Do you realize that you've said, I'm afraid that a while ago you didn't understand my question, Mrs. Bounds.

Do you realize that you have now told me that you could impose the Death Penalty?

BY MRS. BOUNDS: That I can impose the Death Penalty?

BY THE COURT: Yes, ma'am. That is what you just told me, if you understood the question.

BY MRS.
BOUNDS: Okay.

BY THE
COURT: Now, can you or not?

BY MRS.
BOUNDS: I thought you said can I vote against it.

BY THE
COURT: No. Let me read it one more time. It's the same question now, Mrs. Bounds.

"Would you automatically, would you automatically vote against the imposition of the Death Penalty regardless of any evidence that might be developed in the course of the trial?"

BY MRS.
BOUNDS: (No response.)

BY THE
COURT: The question is in the first few words - "Would you vote against". Is your answer to that yes or no?

BY MRS.
BOUNDS: No.

BY THE
COURT: You would not vote against it?

BY MRS.
BOUNDS: (No response.)

BY THE
COURT: You could vote for the Death Penalty?

BY MRS.
BOUNDS: I think I could.

BY THE
COURT: All right. She says she can vote for the Death Penalty.

BY MR.
NECAISE: Judge, I want to make a Motion now.

BY THE
COURT: All right. Come to the Bench and make your Motion.

(At the Bench, with the Court, Counsel and Court Reporter present, and outside the hearing of the Jurors in the Box and of the Courtroom, the following proceedings were then had:

(BY MR.
NECAISE: The State had exhausted their

peremptory challenges, their twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under any circumstances on five differsnt Jurors, which we can give the Court their names, and the Court MADE us use our challenges.

And now we get on one where the Court has, where she has equivocated and where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question.

And I ask the Court, because the Court has not followed this case, throughout the case, that you let us have anothsr challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price

and, uh, who were very unequivocal, that they would not, under any circumstances, would not vote to impose the Death Penalty.

(BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

(BY MR. NECAISE: I didn't either, Judge.

(Discussion between Court and Counsel.

(BY MR. STEGALL: We're going to object to the granting of a thirteenth peremptory challenge. The Court has already ruled on the State's, uh, uh, arguments in previous attempts at challenges for cause and the granting of a thirteenth would, uh, be one in excess of that provided by law. And the Defendant would object, if, uh, ...

(BY MR. NECAISE: Judge, I'm not asking you to give

us a thirteenth challenge. I'm asking the Court to change its ruling and use those, uh, for cause rather than having the Court, uh, rather than having the State to use its peremptories.

I'm asking the Court to, to change its ruling.....

(BY THE COURT: (Interposing) Well, I didn't examine them myself. Of course, I admit that they were unequivocal, about five of them, that answered you that way.

Go ask her if she'd vote guilty or not guilty, if she could vote guilty or not guilty and let's see what she says to that.

If she says, if she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind.

(BY MR. STEGALL: Well, Judge, my, un, we will respond, of course, subject to what happens here.....

(BY THE COURT: (Interposing) All right. All right. Let's go.)

BY MR. NEGAISE: Mrs. Bounds, do you feel like this is a case, and I don't, I certainly don't want you to think that I'm picking on you. But, uh, what we are trying to do here is that we are trying to pick twelve people, uh, who we feel that, uh, would be fair and impartial persons, what we are looking for is people who could be fair and impartial and who could, if the evidence warranted it, could impose the Death Penalty because we feel that this is a case that warrants the imposition of the Death Penalty. We know that the law allows it.

And could you tell me, do you feel like you could reach a verdict in this case, either guilty or not guilty in this case?

BY MRS. BOUNDS: Could I reach a verdict?

BY MR.
NECAISE: A verdict.

BY MRS.
BOUNDS: A verdict?

BY MR.
NECAISE: Yes, ma'am.

BY MRS.
BOUNDS: Either way?

BY MR.
NECAISE: Yes, ma'am.

BY MRS.
BOUNDS: Yes.

BY MR.
NECAISE: You could reach a verdict of guilty or not guilty. Now, if that verdict was guilty and you felt that from the evidence that you used to find him guilty, that evidence which you had used to find him guilty, if you felt that that evidence was of such a heinous, atrocious and cruel manner, do you feel that you could vote for imposing the Death Penalty on this twenty-eight year old Defendant?

BY MRS.
BOUNDS: Yes.

BY MR.
NECAISE: Ma'am?

BY MRS.
BOUNDS: Yes.

BY MR.
NECAISE: Judge, the lady says yes, but we would challenge her for cause.

BY MR.
STEGALL: If it please the Court, I would like to point out that she has answered the question in the proper manner .....

BY THE
COURT: (Interposing) You all approach the Bench. You all approach the Bench.

(At the Bench, with the Court, Counsel and the Court Reporter present, outside the hearing of the Jurors in the Box and of the Courtroom, the following proceedings were then had:

(BY MR.
STEGALL: She answered his question and, and,

she's answered his questions in exactly the proper manner. She, obviously, would have some difficulty, as me or anybody else would, on a Death Penalty, but she said she could do it, if the facts justified it.

Now, Mr. Necaise never used the language of the case that you've been using in directing your questions to them, when he asked these people those questions.

(BY THE COURT: I don't believe he did, either, when you come right down to it. I don't believe you did, Albert.

(BY MR. NECAISE: I didn't use it, but I said could you, in any case, and they said we could not, in any case, we could not and I said, do you mean to tell me that if the law says that you could find this person guilty and sentence him to Life, you tell me that you wouldn't follow the law. No, we would not follow the law, if it meant giving him the Death Penalty. We would not, under any

circumstances. Remember, I even asked one woman, well, what kind of case would you vote for the Death Penalty and she said I don't know of any case that I'd vote for the Death Penalty. And I said give me an example, pick out the case.....

(BY THE COURT: (Interposing) I should have questioned them on this, I guess.....

(BY MR. NECAISE: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)

(BY THE COURT: .....but I never had no idea it was going to.....

(BY MR. STEGALL: (Interposing) Disregarding the evidence.....

(BY THE COURT: .....wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.

Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. I think she is totally indecisive. She says one thing one time and one thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

(BY MR. STEGALL: Excuse her for cause?

(BY THE COURT: I'm going to excuse her.

(BY MR. STEGALL: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record .....

(BY THE COURT: (Interposing) I'm not going to add any to his challenges.

(BY MR. STEGALL: Okay. All right.

(BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.

(BY MR. STEGALL: Okay. All right.)

BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.

CERTIFICATE OF SERVICE

This is to certify that I, Donald G. Barlow, a Special Assistant Attorney General for the State of Mississippi, have caused to be mailed this date, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **Respondent's Brief in Opposition** to the following:

Honorable Andru H. Volinsky
Schapira & Green, P.A.
108 Bay Street
Manchester, New Hampshire 03104

This, the 20th day of December, 1985.

Donald G. Barlow
DONALD G. BARLOW